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No. 88-2109

In the Supreme Court of the United States**OCTOBER TERM, 1989**

**THE STATES OF KANSAS AND MISSOURI,
AS PARENS PATRIAE,***Petitioners,*

vs.

THE KANSAS POWER & LIGHT COMPANY

and

UTILICORP UNITED, INC.,*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

SUPPLEMENTAL BRIEF OF PETITIONERS

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Petitioners file this supplemental brief pursuant to
Rule 22.6 to call the Court's attention to two developments:

1. The Sixth Circuit in *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989), has re-

cently construed the same question presented in this case—the scope of the *Illinois Brick*¹ cost-plus exception—in a manner that it apparently concedes is contrary to the Seventh Circuit's decision in *Panhandle Eastern*.² This new decision heightens the conflict among the circuits on the questions presented by the instant petition for certiorari.

2. Three petitions for certiorari have been filed in this Court seeking review of the Sixth Circuit's opinion in *County of Oakland*:

- (a) No. 89-56, *Allevato v. County of Oakland*, 58 U.S.L.W. 3025 (U.S. July 13, 1989).
- (b) No. 89-79, *City of Detroit v. County of Oakland*, 58 U.S.L.W. 3026 (U.S. July 14, 1989).
- (c) No. 89-101, *Young v. County of Oakland*, 58 U.S.L.W. 3078 (U.S. July 17, 1989).

The Sixth Circuit in *County of Oakland* addressed the exact *Illinois Brick* issue that led to the original split between the Seventh Circuit in *Panhandle Eastern* and the Tenth Circuit in the present case. *County of Oakland* reversed a district court decision that had allowed indirect purchasers of a regulated service to sue. Even though it assumed that 100% of the alleged overcharges were passed on to the ultimate consumers,³ the

1. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

2. *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S.Ct. 543 (1988).

3. The court stated that the real issue before it was whether the direct-purchaser counties were precluded from suing "if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers.

(Continued on following page)

Sixth Circuit decided to read the cost-plus exception in *Illinois Brick* narrowly:

Mindful . . . "of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, assuming it exists, precludes the direct purchaser from maintaining suit in the case at bar.

866 F.2d at 849.

Although the Sixth Circuit's original opinion in *County of Oakland* did not refer to the decisions in either the present case or *Panhandle Eastern*, on rehearing the Sixth Circuit considered and expressly refused to follow *Panhandle Eastern*:

Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 [(7th Cir. 1988) (en banc), cert. denied, . . . U.S. . . ., 102 L. Ed. 2d 573 (1988)], we do not think the purposes of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.]

866 F.2d at 852.⁴

Footnote continued—

the municipalities." 866 F.2d at 845. This assumption of a 100% pass-through was identical to the one made by the Tenth Circuit in the present case.

4. The bracketed portion of this sentence was omitted from the published opinion due to a typographical error. The complete sentence can be found at 1989-1 Trade Cas. (CCH) ¶ 68,571, at 61,047, and at 30a of the Appendix to the Petition for Certiorari in No. 89-79, *City of Detroit v. County of Oakland*.

At least three different circuits are now split on the same issue of antitrust enforcement. Both the Sixth and Tenth Circuits have studied, and rejected, Judge Posner's opinion for the *en banc* Seventh Circuit, and appear to have decided in effect that there is no exception to the direct-purchaser rule, even where 100% of all alleged overcharges have been passed on in a regulated environment.⁵ The full extent and importance of the conflict among the circuits is confirmed by the questions presented in the three certiorari petitions arising from the *County of Oakland* case, which precisely mirror the questions presented here.

The confusion in the lower courts is evident. The issue is an important one that is squarely presented by the present facts. Certiorari should be granted.

5. Still another circuit, the Fifth, has, contrary to the Sixth and Tenth Circuits' approach, found an exception to the direct-purchaser rule where the "functional equivalent" of a cost-plus contract exists, regardless of whether a "fixed quantity" is involved. See *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163-64 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980).

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